IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 99 of 1995.

Reserved on: 21.3.2007.

Date of decision: 23.3.2007.

Smt. Leela alias Leela Devi ... Appellant

Versus

Shri Neelmani … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the appellant : Mr. Ashwani K. Sharma, Advocate.

For the respondent: Mr. Ajay Kumar, Advocate.

V.K. Ahuja, J.:

This is an appeal filed by the appellant against the judgment and decree of the Court of learned Additional District Judge, Kullu, dated 2.1.1995, vide which findings of learned Senior Sub Judge, Kullu, dated 27.8.1992 decreeing the suit of the appellant/plaintiff for possession were reversed and the suit of the appellant/plaintiff was accordingly dismissed.

Briefly stated the facts of the case are that the appellant as plaintiff filed a suit for possession of the land detailed in the plaint alleging that one Arjungir was father of plaintiff and defendant who died sometime in 1965. His estate was inherited by

[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

the plaintiff, defendant and Smt. Maheshru his widow s in equal share. Smt. Maheshru his widow had not given birth to any child from the loins of Arjungir. The plaintiff and defendant had been born to Smt. Bal Dassi, the first wife of Arjungir who had predeceased her husband. It was alleged that after the death of her husband, Smt. Maheshru had executed a legal and final Will in favour of the plaintiff which was also registered on 21.9.1982. Smt. Maheshru died on 27.10.1988 and the mutation was attested in favour of both the parties in equal share and the defendant got mutation attested in his favour also without notice to the plaintiff. It was alleged that since the defendant was not entitled to any share as there was Will in favour of the plaintiff, she was entitled to the possession of the suit land. Defendant denied the execution of the Will. He pleaded that after the death of Arjungir, his father, he had been in adverse possession of the suit land to the exclusion of the plaintiff and others. The plaintiff had been married by Arjungir in Mandi District and had not been looking after the property. He also pleaded that Smt. Maheshru had executed her last Will on 18.9.1988 in favour of Diwan Chand son of the defendant and the mutation was, therefore, rightly sanctioned.

The suit was tried by the learned trial Court who allowed the application of the plaintiff for secondary evidence to prove the Will and the certified copy of the Will was proved from the office of Sub Registrar. No issue was framed by the learned trial Court in regard to the second Will in favour of the son of defendant. It was also not proved in evidence. On consideration of the evidence led by the parties, the learned trial Court decreed the suit in favour

of the plaintiff holding that the Will in favour of the plaintiff has been legally proved.

On appeal, the learned first appellate Court on re-appraisal of the evidence came to the conclusion that though one of the attesting witness and scribe of the Will had been produced apart from the official from Sub Registrar's office, but it was held that the execution of the Will was not proved in the manner as laid down under Section 63 of the Indian Succession Act and hence, the appeal was allowed and the suit was dismissed.

I have heard Mr. Ashwani K. Sharma, Advocate, for the appellant and Mr. Ajay Kumar, Advocate, for the respondent and have also gone through the record.

The submissions made by the learned counsel for the appellant were that the learned trial Court had misread the evidence and had come to a wrong conclusion, therefore, the evidence has to be reappraised by this Court. It was submitted that the substantial question of law involved was that the statement of the attesting witnesses and scribe coupled with the endorsement of the Sub Registrar about thumb impression of the testatrix were sufficient proof of due execution of the registered Will and, therefore, the learned first appellate Court had wrongly reversed the findings by misreading the evidence. It was submitted that the registration of the Will is a proof of its due execution and since the Will stood proved from the testimony of one attesting witness and scribe, the findings of the first appellate Court are liable to be reversed. In support of his submission that the registration of the Will is a proof of due execution, he relied upon a decision of this Court in **Shri Kripa Ram and others** Vs. **Smt. Maina**, **2002(2) Shim. L.C.**

213, wherein it was held that there was a certificate on document, registered by Registrar, admissible in evidence under Section 60 of the Act and there was thus presumption of correctness of endorsements on document. In that case the document involved was a sale deed and not a Will.

On the other hand, the learned counsel appearing for the respondent had supported the impugned judgment for the reasons recorded therein supplementing it by submission that the attesting witness or the scribe had not stated that the testatrix had signed in presence of the witnesses or the witnesses signed in presence of the testatrix and, therefore, the Will did not stand proved as provided under Section 63 of the Succession Act. In regard to the plea that the Will was registered one and it was a proof of its due execution, it was submitted that the mere fact that the Will was registered one does not dispense with the proof of Will as required under Section 63 of the Succession Act. In support of his submission, he had relied upon the decision in **Vattakam Purath Parambil Ananda Bhai and another** Vs. **Kanaka Bhai and others**, **AIR 1995 Kerala 208**, wherein it was held as under:

> "Merely because a Will is registered its genuineness cannot be presumed. Registration of a Will does not change the onus of proof from its propounder to the challenger. Whether a Will is registered or not, it is for the propounder to establish by reliable evidence that the Will was signed by the testator, that he at the relevant time was in a sound and disposing state of mind and that he fully realized the nature and effect of the disposition and signed it on his own free will. As the burden is heavily upon the propounder to prove the Will he cannot adopt

> the stand that the registration of the Will itself is a circumstance to dispel any suspicious circumstance. When the genuineness of the Will is challenged the propounder has necessarily to substantiate his case regarding its genuineness even in a case where it is registered. At best registration of a Will though not required by law is only a piece of evidence of the execution. But it cannot have greater sanctity."

Coming to the substantial question of law as to whether there was misreading of evidence, the learned first appellate Court had observed in its judgment that one of the attesting witness PW-4 Jai Chand who was examined has not stated at all as to whether Smt. Maheshru thumb marked the Will or signed it or whether he or other witness also thumb marked the Will or signed the same in her presence. He was thus completely silent about the execution of the Will by Smt. Maheshru. A reference was also made to the certified copy of the Will that there is a mention in the endorsement of the Sub Registrar about the thumb impression of Smt. Maheshru below the endorsement, but a plain look on Ext. PA shows that there was no thumb impression or signatures of the executant or the alleged witnesses appended to the Will in question. Thus, there was complete lack of evidence about the thumb impression or signatures of the executant or the witnesses on the alleged Will. The plaintiff had also examined the scribe of the Will, namely, PW-3 Sita Ram, petition writer who only stated that he scribed the Will at the instance of Smt. Maheshru and did not state that the executant also appended her thumb impression to the alleged Will in presence of witnesses. He also did not clarify as to in whose presence, the Will was scribed by him.

Thus, it is clear that the learned first Appellate Court had discussed the evidence in its right perspective. There is nothing that there was misreading of evidence calling for re-appraisal of the evidence by this Court and the mere fact that the Will was registered one is no proof of its due execution which has to be proved in accordance with law, in which the plaintiff had failed. Therefore, the learned first appellate Court had rightly dismissed the suit of the plaintiff and allowed the appeal filed as against the findings of the learned trial Court. There is no merit in the appeal, which deserves to be dismissed and the same is accordingly dismissed. The parties are left to bear their own costs.

(V.K. Ahuja),
Judge

March 23 , 2007
(BSS)